

IN THE MATTER OF THE CLAIM
OF TINA AND RON JOHNSON,
CLAIMANTS

AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GERALD WHITE,
T/A JERRY'S LANDSCAPING BY
THE YARD LLC,

* BEFORE DEBORAH S. RICHARDSON,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-16-10680
* MHIC No.: 16 (90) 128

RESPONDENT

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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 23, 2015, Tina and Ron Johnson (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$16,100.00 in alleged actual losses suffered as a result of a home improvement contract with Gerald White, trading as Jerry's Landscaping by the Yard, LLC (Respondent).

I held a hearing on October 24, 2016, at the Office of Administrative Hearings (OAH) at 11101 Gilroy Road, Hunt Valley, MD 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimants represented themselves. Eric London, Assistant Attorney General,

Department of Labor, Licensing and Regulation, represented the Fund. After waiting more than fifteen minutes for the Respondent or someone to represent him, I proceeded with the hearing without him. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the MHIC procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02.01B; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

Clmt. Ex. 1 - Table of Contents

Clmt. Ex. 2 - Chronological Order of Events with Attachments

Attachment A - Contract, June 30, 2010

Attachment B - Checks and Bank Records, various dates 2010

Attachment C - Application for construction to Claimants' Homeowners Association, May 13, 2010

Attachment D - Photograph, Fall 2010

¹ Notice of the hearing was mailed to the Respondent at the address of record by certified mail on October 24, 2016, COMAR 09.08.03.03A(2), and was not returned unclaimed. Therefore, based on the Court of Appeals' holding in *Golden Sands Club Condominium, Inc. v. Waller*, 313 Md. 484 (1988), I conclude that OAH's notice to the Respondent was adequate under section 8-312(d) of the Business Regulation Article and 10-209(c) of the State Government Article.

- Attachment E - EZflow Drain Systems Design and Installation Manual, July 2010
- Attachment F - Photographs, July 2015 and October 2015
- Attachment G - Photographs, July 2015
- Attachment H - Article – “Retaining Walls Failure” from www.inspectorgroup.com/au, October 7, 2016
- Attachment I - Letter To Whom It May Concern from Kristen Robert, October 17, 2016; Article – “Powerful Snowstorm Coats Much of Maryland; More to Come for Some,” WBALTV 11, February 15, 2014
- Attachment J - Letter to the Respondent from the Claimants, April 17, 2014
- Attachment K - Invoice, from Polymeric, June 4, 2014
- Attachment L - Letter to the Respondent from the Claimants, July 26, 2014
- Attachment M - Check, July 26, 2014; Letter to Green Oak Landscaping from the Claimants, July 26, 2014
- Attachment N - Letter to the Respondent from the Claimants, August 6, 2014
- Attachment O - Photographs, July 2015
- Attachment P - Thumb drive of video, July 2015
- Attachment Q - Proposal from American Home & Hardscape, June 29, 2015
- Attachment R - Letter to the Respondent from the Claimants, June 29, 2015
- Attachment S - Not admitted
- Attachment T - Letter to the Claimants from the Respondent, July 24, 2015
- Attachment U - Letter to the Claimants from Joe Zynel, General Adjuster, September 7, 2015; Letter to the Claimants from Frederick Mutual Insurance Co., July 29, 2015
- Attachment V - Letter to David Finneran, MHIC from the Respondent, August 20, 2015
- Attachment W - Letter to MHIC from the Claimants, October 23, 2015
- Attachment X - Photographs, July 2015

Attachment Y - Letter to the Respondent from Joseph Tunney, MHIC, November 5, 2015

Attachment Z - Proposal from ALC Custom Landscapes, Inc., October 16, 2015;
Proposal from American Home & Hardscape, June 29, 2015;
Proposal from Absolute Landscape & Turf Services, Inc., 2015

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing with attached certified mail receipts, July 27, 2016

Fund Ex. 2 - Hearing Order, March 31, 2016

Fund Ex. 3 - Letter to Whom It May Concern from David Finneran, MHIC, August 30, 2016

Fund Ex. 4 - Home Improvement Claim Form, October 23, 2015

Fund Ex. 5 - Letter to the Respondent from Joseph Tunney, MHIC, November 5, 2015

I did not admit any exhibits on the Respondent's behalf.

Testimony

Mrs. Johnson testified on behalf of both Claimants and presented the testimony of Greg Coles, accepted as an expert in the construction of retaining walls.

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC Contractor's license numbers 01-99885 and 05-127533.

2. At all times relevant to this matter, the Claimants owned a single family home in Eldersburg, Maryland (the Property). The Claimants live in the Property.

3. The Property had a very steep hill in the backyard. On June 30, 2010, the Claimants and the Respondent entered into a contract (Contract) to build three terraced landscape-block retaining walls across the rear slope of the Property, including drainage for all

three walls. The length of all three walls was to be seventy-three feet and the height of the lowest wall, closest to the house, was to be almost four feet tall, the second wall was three feet tall and the third wall, furthest from the house, was two feet tall. The contract provides for ten foot sections of nine inch piping for drainage. The agreed-upon Contract price was \$26,150.00.

4. The Claimants and the Respondent orally agreed to change orders in the amount of \$2,850 for mulch, trees, and weed mat not covered in the original contract.

5. The Claimant paid the Respondent a total of \$29,000.00 as follows: \$13,075.00 on June 30, 2010; \$6,500.00 on July 23, 2010; \$2,550.00 on October 2, 2010; \$3,000.00 on October 12, 2010; and \$3,875.00 on October 30, 2010.

6. The Respondent completed work on the Contract by October 2010.

7. In January 2013, after a heavy rainfall, a significant amount of water entered the Claimant's basement from their backyard. The Claimants' sump pump failed and their basement flooded.

8. After a very heavy snowfall around mid-February 2014, water came pouring out from between the blocks in the terrace walls. The water went from each level to the next and then onto the lawn towards the Claimant's house.

9. The Respondent made several attempts throughout 2014 to ameliorate the problems with the walls, none of which were successful.

10. By 2015, the following defects in the terrace walls had been revealed:

- The Respondent used hollow EP Henry stone blocks to build the retaining walls as called for in the Contract. The Respondent did not fill the blocks with stones according to EP Henry guidelines.
- The Respondent did not install six inches of modified stone beneath each wall as called for in the Contract.
- The second and third walls were not installed with half of the blocks buried as called for by the Contract.

- The Respondent did not install any drainage pipes behind the uppermost walls as called for in the Contract.
- Where he did install drainage, the Respondent used a product called EZ Flow. The Respondent did not install the EZ Flow according to the manufacturer's instructions. He also used an EZ Flow product intended for landscaping, not retaining walls.
- Water continues to pour through the walls after rainfalls.
- The retaining walls are failing. Parts of the walls are sinking. The walls are shifting and bulging in places. There is also significant erosion around the walls.

11. Remediating the Respondent's defective construction of the terrace walls requires the disassembly and re-building of all three walls. Total disassembly and reinstallation is necessary to fill the blocks with stone properly, bury the blocks, put six inches of stone below the blocks, and install drainage pipes, all of which the Respondent did not do, but should have done originally. Doing this work will ensure no more water encroaches on the Property.

12. The cost of disassembling and re-building the terrace walls is \$15,600.00.

13. The Claimant's actual loss is \$15,600.00.

DISCUSSION

The Claimants have the burden of proving the validity of their claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).² “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002) (quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000)).

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015);³ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. There is no *prima facie* impediment to the Claimants’ recovery from the Fund (being related to or employed by the Respondent; recovering damages from the Respondent in court or through insurance stemming from the same facts that are the basis of their claim; not occupying the property that is the subject of the contract; or owning more than three houses). Md. Code Ann., Bus. Reg. §§ 8-405(f) and 8-408(b)(1).

The Claimants have shown that the Respondent provided an unworkmanlike, inadequate and incomplete home improvement. The Respondent completed work on three terraced retaining walls at the Claimants’ Property in October 2010. By 2013 the Claimants’ basement flooded after a heavy rainfall. In 2014 the Claimants witnessed water pouring between the blocks in the walls after it had snowed. The walls began to deteriorate, shifting and bulging in places. The soil around the walls began eroding as well. When first confronted with the problems, the Respondent told the Claimants that the problems were due to rainwater runoff coming from the field behind the Property. He contended that he built the walls properly with all required drainage. The Respondent made several attempts to correct the problems with the walls, some at

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

the expense of the Claimants, all to no avail. Eventually the Respondent admitted to the Claimants that he did not install drainage behind the top wall. Greg Coles, whom I accepted as an expert in the construction of retaining walls, testified convincingly and conclusively that the walls were constructed improperly and that the situation will continue to worsen over time. The Fund agreed that the Respondent performed unworkmanlike construction. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimants are entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

It is uncontroverted that the Claimants paid the Respondent \$29,000.00, which represents the original agreed upon contract price plus change orders. The only issue is the amount required to repair the unworkmanlike construction. The Claimants obtained three quotes from licensed contractors to repair the terraced walls. The quote from ALC Custom Landscapes (ALC), owned

by Mr. Coles, is for \$16,100.00.⁴ American Home & Hardscape (American) quoted \$10,800.00. Absolute Landscape & Turf Services, Inc. (Absolute) quoted \$9,500.00.

The quote from ALC includes disassembly and re-installation of all three walls. Mr. Coles testified that these steps are necessary to ensure that no more water encroaches on the Property. This full disassembly and re-installation would allow him to properly fill the blocks with stone, bury the blocks, put six inches of stone below the blocks, and install drainage pipes, everything the Respondent should have done in the first place when he built the walls.

I find that the ALC quote is the best estimate with which to measure the Claimants' actual loss. The American quote only provides that the upper and middle walls be deconstructed and re-installed. American then proposed to dig out behind the lower wall and back-fill the blocks with stone. Mr. Coles testified that in his opinion this repair did not meet industry standard and would not sufficiently address the defects in this construction. Based on Mr. Coles' uncontroverted expertise in wall construction techniques, I accept Mr. Coles' opinion that the American estimate is inadequate and cannot be used to determine the cost of remediating the Respondent's poor work.

The Absolute quote proposes that it "Dig out soil from behind retaining walls, fix/repair settled areas of block, remove caps from walls, fill core of blocks and behind retaining walls with #57 clean stone, install drain pipes as needed along back of wall and return through face of wall." (Clmt. Ex. 2, Attachment Z). The Fund contends that this is an adequate proposal for repair of the terraced walls, arguing that it appears this proposal is for the same scope of work as that proposed by ALC, and it is for less money. Mr. Coles, however, countered that the Absolute proposal is unclear whether it intends to entirely disassemble all three walls. Even more importantly, the Claimant, Mrs. Johnson, testified that no one from Absolute returned her phone

⁴ Mr. Coles acknowledged that \$500 of this quote covered mulch that was not included in the original contract.

calls or emails after providing her with a quote. As with respect to the American estimate, I similarly agree with Mr. Coles' opinion that the Absolute estimate is inadequate for determining the cost of remediating the Respondent's poor work. Moreover, Mrs. Johnson has genuine concerns about the reliability of Absolute that stem from her inability to communicate with anyone from that company after it provided its repair estimate. Therefore, it would be entirely unreasonable to require the Claimants to measure their actual loss using a cost of repair estimate from a company that is unprofessional, and does not appear ready and able to actually perform the work it has proposed.

The unworkmanlike construction provided by the Respondent here is very serious, the deficiencies of which threaten water infiltration into the Property, a potentially devastating problem. The Claimants are well within their rights to have the wall constructed properly to avoid any continued problems. Mr. Coles testified convincingly that a proper repair requires disassembly of all three walls. Thus, the American quote is not a viable option. I also agree with Mr. Coles that the Absolute quote is unclear whether it proposes to disassemble all three walls, and I agree with Mrs. Johnson about that company's potential unreliability. Therefore, I believe that ALC's quote of \$16,100.00 to repair the terraced walls is reasonable and provides the best means by which to determine the Claimants' actual loss.

The calculation under the above formula is as follows:

	\$29,000.00	-- amount paid
+	\$15,600.00	-- cost to correct work (\$16,100 - \$500 for mulch not in original contract)
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	\$44,600.00	-- subtotal
-	\$29,000.00	-- less the original contract price
	<hr/>	
	\$15,600.00	

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). The Claimants' actual loss of \$15,600.00 exceeds neither of these two amounts, thus the Claimants are entitled to receive the entire amount of their actual loss.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants sustained an actual and compensable loss of \$15,600.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03 B(3)(c).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$15,600.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

January 10, 2017
Date Proposed Decision Issued

Deborah S. Richardson
Administrative Law Judge

DSR/da
165792

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of March, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

Joseph Tunney

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION